Supreme Court, U.S.
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No. 06-925

In The Supreme Court of the United States

ROBERT ALEXANDER VERBAL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Petitioner was charged with Felony Murder. During its deliberation, the jury sent a note out to the judge asking if they had to convict the Petitioner of Felony Murder even if they thought the killing was accidental. The judge responded, "The felony murder rule was promulgated to deter even accidental killings..." (App. D).

The jury then convicted Petitioner and the trial judge imposed the mandatory sentence of life without parole. A week later, two jurors filed affidavits expressing their belief that the shootings were accidental and that the sentence was "grossly unfair." (App. D).

On appeal, the North Carolina Court of Appeals rejected Petitioner's claim that a sentence of life without parole for an accidental shooting was cruel and unusual punishment, but made no finding as to whether there was an *inference* of gross disproportionality between the sentence and the crime. Petitioner contends that the test employed by the state court to analyze Eighth Amendment claims conflicts with the test promulgated by this Court.

The Question Presented is:

WHETHER THE TEST EMPLOYED BY THE NORTH CAROLINA COURT OF APPEALS TO EVALUATE WHETHER A SENTENCE OF LIFE WITHOUT PAROLE FOR AN ARGUABLY ACCIDENTAL KILLING

VIOLATED THE EIGHTH AMENDMENT CONFLICTS WITH THE TEST PROMULGATED BY THIS COURT IN *HARMELIN V. MICHIGAN*, 501 U.S. 957, 111 S. CT. 2680 (1991) AND *EWING V. CALIFORNIA*, 123 S. CT. 1179 (2003)?

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PETITION FOR WRIT OF CERTIORARI

NOW COMES ROBERT ALEXANDER VERBAL, Petitioner herein, and requests that this Court issue a Writ of Certiorari to the North Carolina Court of Appeals to review its decision filed on April 18, 2006, upholding Petitioner's conviction and sentence.

OPINIONS BELOW

The North Carolina Court of Appeals filed an opinion on April 18, 2006, affirming the conviction and sentence. *State v. Verbal*, 628 S.E.2d 260, 2006 WL 997758 (N.C.App.) (2006); App. A. The North Carolina Supreme Court filed an order on October 5, 2006, dismissing the Petitioner's appeal from the Court of Appeals for lack of a substantial constitutional question. *State v. Verbal*, --- S.E.2d ---, 2006 WL 2939123 (N.C.) (October 5, 2006); App. B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Eighth Amendment provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States C titution provides in relevant part: "[N]or shall an ate deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. On May 12, 2003, Petitioner was indicted for the first degree murder of David Cornelius Blue and Conspiracy to Commit Robbery with a Dangerous Weapon.

2. The Petitioner was tried on these charges at the August 9, 2004 Criminal Session of the Superior Court, Moore County, before a jury and the Honorable Ronald E. Spivey, Superior Court Judge Presiding.

3. The jury found the Petitioner guilty of first degree murder under the felony murder rule and conspiracy to commit armed robbery. The jury did not find that the murder was premeditated and deliberated.

4. The judge sentenced Petitioner to life without parole. (App. C).

5. Petitioner entered a notice of appeal.

6. On August 23, 2004, Defendant filed a Motion for Appropriate Relief raising constitutional questions. (App. D). The basis for that motion was that the sentence constituted cruel and unusual punishment because it was disproportionate to the crime. The motion

was denied by Judge Spivey on September 13, 2004.

7. The Petitioner appealed to the North Carolina Court of Appeals ("Court of Appeals") and, by opinion dated April 18, 2006, that court found no error in the judgment or sentence imposed. (App. A). The Eighth Amendment claim was denied on the merits by the Court of Appeals.

8. On May 22, 2006, Petitioner gave notice of appeal to the North Carolina Supreme Court based on three constitutional issues, including the Eighth Amendment disproportionality claim.

9. The North Carolina Supreme Court filed an order on October 5, 2006, dismissing the Petitioner's appeal for lack of a substantial constitutional question. (App. B).

STATEMENT OF THE FACTS

At trial, Petitioner testified to what happened on the night David Blue ("Blue") died. Petitioner and Chris Barkley ("Barkley") decided to go to Roderick Hammond's ("Hammond") house to buy some more marijuana. When Petitioner knocked on the door, Blue let him in. Petitioner knew Blue. Hammond and Petitioner had known each other all their lives. No attempt was made by Petitioner to cover his identity when he entered the house that night. When Petitioner reached into his pocket for the money to pay for the marijuana, a gun fell out. He and Hammond lunged for the gun and wrestled over

it. The gun discharged a couple of times, possibly hitting a third person in the leg.

Hammond yelled for his uncle, Blue. Blue grabbed Barkley as Petitioner and Hammond continued to struggle for the gun. The gun discharged again and Petitioner fell backward from pulling the gun so hard. He and Barkley fled from the house.

When Petitioner was arrested in the morning, he was scared. He told the police where the .25 caliber gun was because he did not want them to think he was going for it. Verbal told the jury that he never intended to rob anyone. He stated that he never should have gone to Hammond's with "that crazy fool." He admitted that he had been smoking marijuana and drinking beer on the day Blue was shot.

The other parties involved in the incident testified pursuant to plea arrangements. Hammond testified that Petitioner and another man entered the house and Petitioner pulled a gun. He admitted that he and Petitioner had struggled over the gun. He saw Blue and Barkley struggle. Hammond stated that he heard a shot as he ran from the house.

During Petitioner's trial, the jury asked for a clarification of accidental discharge and if an accidental killing still fell under felony murder. The jury rejected premeditation and deliberation and found the defendant guilty of felony murder and conspiracy to commit armed robbery. After they were discharged, jurors contacted defense counsel

concerning the severity of the sentence Petitioner received. Two jurors came forth with affidavits stating that they believed the majority of the jury believed the shooting was accidental.

Defense counsel filed a Motion for Appropriate relief on the basis that the sentence imposed violated the Eighth and Fourteenth Amendments to the United States Constitution. (App. E). A hearing was held and, at the conclusion of the hearing, the motion was denied. The North Carolina Appellate Courts also denied any relief.

The North Carolina Court of Appeals addressed the issue of cruel and unusual punishment. It recognized a proportionality principle applied but that successful challenges were rare. North Carolina General Statute § 14-17 authorizes a punishment of either death or imprisonment without parole for felony murder. The Court of Appeals further stated that:

> "North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense." *State v. Stinnett,* 129 N.C.App. 192, 200, 497 S.E.2d 696, 701, *disc. rev. denied,* 348 N.C. 508, 510 S .E.2d 669, *cert. denied,* 525 U.S. 1008, 142 L. Ed. 2d 436 (1998). A punishment of life imprisonment without parole is consistent with N.C. Gen. Stat. § 14-17

and does not violate the Eighth Amendment.

State v. Verbal, 628 S.E.2d 260, 2006 WL 997758, *5 (N.C.App.) (2006); App A. The North Carolina Supreme Court dismissed Petitioner's appeal from this decision on the basis of lack of substantial constitutional basis.

REASONS WHY THE WRIT SHOULD ISSUE

This Court has recognized that Eighth Amendment jurisprudence recognizes a gross disproportionality component. Because the Eighth Amendment is an important check on the state legislature's power to punish criminals, the Court should allow review of Petitioner's case to guide the North Carolina courts in application of the Eighth Amendment.

A. North Carolina's interpretation of the Eighth Amendment is in conflict with this Court's precedent.

North Carolina courts have long held that if a punishment is authorized by law, it is constitutional. See *State v. Bruce*, 150 S.E.2d 216 (N.C.,1966); *State v. Daniels*, 148 S.E.2d 244 (N.C.,1929); *State v. Evans*, 162 N.C.App. 540, 591 S.E.2d 564 (2004). The Petitioner contends that following this Court's opinion in *Ewing v. California*, 123 S. Ct. 1179 (2003), North Carolina's blanket statement that if a punishment is authorized by law it is constitutional is in conflict with the principle that the Eighth Amendment has a proportionality component which

must be considered in light of the crime and the punishment.

This Court has ruled that proportionality principles apply in the non-capital context. *Ewing v. California*, 123 S. Ct. 1179 (2003). The purpose of disproportionality review is to measure "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender." *Rummel v. Estelle*, 455 U.S. 263, 288, 100 S. Ct. 1133, 1147 (1980). This Court stated that the inquiry "focuses on whether, a person deserves such punishment, not on whether punishment would serve a utilitarian goal." *Id.*

In addressing the Petitioner's contentions, the North Carolina Court of Appeals noted that one purpose of the felony murder rule was to deter murders during the commission of a felony, even if the death resulted from an accident. The Petitioner contends that this "utilitarian goal" must be compared with Petitioner's actions when deciding if the punishment he received is grossly disproportionate. The Court of Appeals made no reference to the facts of the case or the Petitioner's prior criminal record in deciding that the punishment withstood constitutional muster.

The Petitioner asks this Court to clarify the process to be used in deciding cruel and usual punishment claims based on gross disproportionality. In *Ewing*, this Court was divided on the application of the grossly disproportionate standard to the facts of Ewing's case. In *State v.*

Clifton, 158 N.C.App. 88, 580 S.E.2d 40 (2003), the North Carolina Court of Appeals stated that "*Ewing* does not significantly clarify the 'grossly disproportionate' standard other than to reaffirm that it will be violated only in the 'rare' case." *Id.* at 94, 580 S.E.2d at 44. That court then stated that the facts in *Clifton* did not "meet the standard of an 'exceedingly rare' and 'extreme' case, in which the 'grossly disproportionate' principle would be violated" and upheld his sentence as a habitual felon. *Id.*, 580 S.E.2d at 45 (citations omitted). The Court of Appeals did not discuss whether there was an inference of disproportionality; it discussed only that the sentence was not grossly disproportionate without determining if an interjurisdictional and intrajurisdictional comparison was needed.

In *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680 (1991), Justice Kennedy's concurring opinion set forth a three step process to evaluate claims of excessively long sentences to determine whether they are cruel and unusual. The crux of Justice Kennedy's opinion is as follows:

> A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an *inference of gross disproportionality*.

Harmelin, 501 U.S. at 1006 (emphasis added). Therefore the first step, or prong, of Justice

Kennedy's test is whether there is an *inference* that the sentence may be grossly disproportionate to the offense. The Petitioner contends that a defendant need not prove, at this stage, that, *in fact*, the sentence is grossly proportionate. It suffices to show that a reasonable person may, but is not compelled to, conclude that a sentence is grossly disproportionate.

In his dissent in *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179 (2003), Justice Breyer discusses extensively the difference between a threshold test and a determinative test.

> A threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences, to pass the threshold—at least where the arguments for unconstitutionality are unusually strong ones. A threshold test that blocked every ultimately invalid constitutional claim—even strong ones—would not be a *threshold* test but a *determinative* test.

Ewing, 123 S. Ct. at 1197 (emphasis in original). By definition, therefore, there may be cases which satisfy the initial prong of possessing an inference of gross disproportionality which ultimately are not found to be grossly disproportionate.

The North Carolina Court of Appeals completely skipped this test and concluded that the sentence was not grossly disproportionate. Petitioner contends that the proper analysis begins

with whether a comparison of the crime and the punishment leads to an inference of disproportionality. In *Ewing*, this Court's analysis ended there, stating "Ewing's is not 'the rare case in which a *threshold comparison of the crime committed and the sentence imposed* leads to *an inference* of gross disproportionality.'" *Id.* at 1190 *citing Harmelin*, 501 U.S. at 1005, 111 S. Ct. 2680 (KENNEDY, J. concurring in part and concurring in judgment) (emphasis added). The Court determined in *Ewing* that there was no inference based on the crime and the sentence whereas in this case, the Court of Appeals skipped whether there was an inference of disproportionality and went right to whether the sentence was disproportionate. The Court of Appeals concluded that it was not.

Had the Court of Appeals examined the sentence and the crime, they would have recognized that the Petitioner was given the second harshest sentence under the penal code for an accidental shooting. Even members of the jury were concerned about the harshness of the sentence imposed given that they believed the shooting was accidental. (Affidavits of two jurors are attached to the Motion for Appropriate Relief, App. D). The concern of the jurors, and the harshness of the sentence, should have led the Court of Appeals to conclude that there was an inference of gross disproportionality.

If the North Carolina Court of Appeals had found an inference of gross disproportionality, the intrajurisdictional and interjurisdictional comparisons would have revealed that North

Carolina is unique in its treatment of those found guilty of felony murder.

Under North Carolina law, the state has four options for prosecuting homicides. Under North Carolina General Statutes § 14-17, murder that occurs during a felony or with malice and premeditation and deliberation is First Degree Murder[1] and defined as a class A felony punishable by death or life imprisonment without parole. Under the same statute, second degree murder, which requires malice but not specific intent to kill, is classed as a B2 felony punishable by 125 to 387 months imprisonment, depending on the offender's prior record level.[2] See N.C. Gen. Stat. § 15A-1340.17 (2006) for sentencing grid.) The next option for homicide cases is voluntary manslaughter which does not require malice. Voluntary manslaughter is a Class D felony and punishable by 51-185 months imprisonment. N.C. Gen. Stat. § 14-18 (2006). The last category, which Petitioner contends would be the most the state could prove without the attempted robbery, is involuntary manslaughter. Involuntary manslaughter does not require intent or malice but requires that the killing be unlawful. It is a class F felony punishable by 13-56 months imprisonment. *Id.* A comparison of the Petitioner's

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[1] First degree murder also includes killing another by means of poisoning, lying in wait, imprisonment, starvation, or torture. Because these methods are not implicated in Petitioner's case, Petitioner will not examine them in his comparison.

[2] Sentence ranges given are from the presumptive range as no aggravating factors were found in Petitioner's case. Also, the sentence within the ranges given is dependent upon the offender's prior record.

sentence of life imprisonment with a maximum punishment of less than five years for an unintentional, yet unlawful, killing supports Petitioner's position that the sentence is grossly disproportionate to the crime. Further, all people convicted under this statute are given either death or life imprisonment without parole. This means that a person who commits premeditated and deliberated, i.e. purposeful, murder can receive the same sentence as the Petitioner for what was an unintentional shooting.

The interjurisdictional comparison reveals that North Carolina is harshest in its treatment of those convicted of felony murder. Under North Carolina law, the only punishments available for felony murder are death and life in prison without parole. The underlying felony can be any felony so long as there is a dangerous weapon involved. The weapon does not actually have to be used but merely be possessed by the offender during the commission of the crime. *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985).

Only five other states are this broad in the range of felonies that may be used as a predicate to a felony murder charge: Georgia, Delaware, Missouri, New Mexico, and Pennsylvania. Of these five, all allow for a lesser punishment than life without parole. Georgia, and New Mexico allow for death or life imprisonment. GA. CODE ANN. § 16-5-1 (1968); N.M. STAT. ANN. § 30-2-1 (1994). N.M. STAT. ANN. § 31-18-14 (2006). Pennsylvania classifies felony murder as second degree and imposes a punishment of life imprisonment. PA. CONS. STAT. ANN. tit. 18, §

2502 (2006); PA. CONS. STAT. ANN. tit. 18, § 1102 (2006). Missouri allows for life imprisonment or 10-30 years imprisonment. Delaware has two categories for felony murder. If it is in the first degree which uses a recklessness standard, the punishment is death or life imprisonment without Parole. DEL. CODE ANN. Tit. 11, §-636 (2004); DEL. CODE ANN. Tit. 11, § 4209 (2003). If the felony murder is the result of criminal negligence it is classified as second degree murder and punished by 15 years in prison to life imprisonment. DEL. CODE ANN. Tit. 11, § 635 (2006); DEL. CODE ANN. Tit. 11, § 4205 (2003). As this examination of other jurisdictions shows, North Carolina has a broad application of the felony murder rule and a mandatory punishment harsher than that imposed by other states. This examination of the Petitioner's sentence suggests that it may violate the Eighth Amendment proportionality principle.

B. This case is an excellent vehicle in which to clarify the process to be used to evaluate claims of gross disproportionality.

This case does not involve a sentence enhancement for an habitual offender, but rather a sentence that applies regardless of the offender's prior criminal record. Also, the evidence suggested that the shooting was unintended, which this Court has recognized as a factor to be considered in determining gross disproportionality. See *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368 (1982) (declaring Enmund's death sentence unconstitutional when he did not intend that deadly

force would be used during a robbery) and *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987) (upholding a sentence where the defendant's mental state was one of reckless indifference). Neither the Petitioner's prior record nor his state of mind was considered in evaluating whether his sentence led to an inference of grossly disproportionality.

Because the North Carolina's evaluation of claims of gross disproportionality conflicts with this Court's precedents and because the Petitioner's case is a good avenue for reviewing the process, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to the North Carolina Court of Appeals.

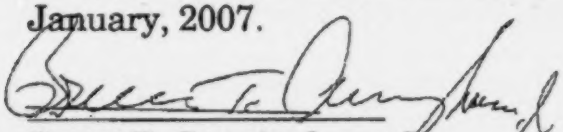
CONCLUSION

The North Carolina courts and other courts need guidance on how to apply the clearly established disproportionality principle of the Eighth Amendment and this is a good case in which to clarify how the principle should be applied. For the foregoing reasons, this Court should grant its Writ of Certiorari.

In the alternative, this Court may summarily reverse the decision of the North Carolina Court of Appeals, as the North Carolina Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. Ct. R. 10(c); SUP. Ct. R. 16; *Maryland v. Dyson*, 527 U.S. 465, 465 n.1 (1999) (per curium) ("summary reversal does not decide any new or unanswered

question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.")

Respectfully submitted this the 4th day of January, 2007.



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APPENDIX A

State v. VerbalN.C.App.,2006.NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of North Carolina.
STATE of North Carolina
v.
Robert Alexander VERBAL.
No. COA05-1000.

April 18, 2006.

*1 Appeal by defendant from judgment entered 12 August 2004 by Judge Ronald E. Spivey in Moore County Superior Court. Heard in the Court of Appeals 29 March 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Nora Henry Hargrove, for defendant-appellant.

Bruce T. Cunnigham, Jr. and Holly Bryan, for Amicus Curiae North Carolina Academy of Trial Lawyers.

TYSON, Judge.

Robert Alexander Verbal ("defendant") appeals from judgment entered after a jury found him to be guilty of felony murder and conspiracy to commit armed robbery. Defendant was sentenced to life imprisonment without parole. We find no error.

I. Background

A. State's Evidence

On 6 February 2003, Maurice Nealy ("Nealy") suggested to defendant, Chris Barkley ("Barkley"), and Eric Perkins ("Perkins") that they should rob his neighbor and known drug dealer, Rodrick Hammond ("Hammond"). Nealy offered defendant a loaded .380 caliber handgun for defendant to use in the robbery. Defendant gave Barkley his .25 caliber handgun to use in the robbery. Perkins drove them to Nealy's home located in Hammond's neighborhood.

Hammond was at home with his uncle, David Blue ("Blue"), his girlfriend, Kim Fairley ("Fairley"), and Fairley's children when someone knocked on Hammond's back door. Defendant and Barkley entered Hammond's house. Defendant walked towards Hammond pointing his gun. Hammond grabbed the gun to move it away from his face. The gun discharged and shot Hammond in the hand.

Fairley heard "some shoving" and someone demand, "give it up." After walking into the hallway, she saw defendant and Barkley with "guns out." Barkley shoved a gun in her face and told her to go back to her room.

Hammond struggled with defendant, but failed to gain control of the pistol. Hammond saw Blue struggling with Barkley at the back door. Hammond escaped and ran to a neighbor's house. While Hammond ran, he heard a gunshot and called the police.

Perkins picked up defendant and Barkley and drove away from the scene. Nealy was also present inside the vehicle. Defendant told Nealy the gun "was hot," and he had shot someone. Perkins saw defendant holding a silver gun and wiping it down. Defendant returned the .380 to Nealy. Defendant stated he had "shot him in the leg" and complained Barkley did not do what was planned. Barkley told defendant he was unable to shoot the gun because the safety lock was engaged. Police responded to Hammond's call and Hammond directed them to his house. Fairley informed Hammond that Blue had been shot. Hammond retrieved money hidden in his house and rode in the ambulance with Blue to the hospital. Police later discovered drugs near the location where Hammond had retrieved the money.

Investigators recovered three .380 caliber spent shell casings from the scene, two from the hallway of the residence and one from the floor inside the bedroom where Blue was found dead. Ballistic testing confirmed two of the shell casings had been fired from the same weapon. These casings also possessed the same characteristics as those fired from the .380 caliber handgun police had seized as a part of the investigation. Two bullets recovered from Blue's body were fired from that .380 caliber handgun. Blue died from a gunshot wound to his abdomen. An absence of gunpowder on Blue's skin indicated his wounds did not result from contact or close-range shots.

*2 Defendant provided investigators with the .25 caliber pistol. Defendant asserted he had carried the .25 caliber pistol and that Barkley had carried the .380 caliber pistol. Defendant told investigators he

was not scared, did not shoot anyone, and knew he should not have accompanied Barkley, who he referred to as "that crazy fool."

B. Defendant's Evidence

Defendant testified he knew Nealy and "hung with him from time to time." Defendant knew Barkley and "sold drugs to him from time to time." On 6 February 2003, defendant was present at his girlfriend, Deitra Cole's, house. When Nealy entered her house, defendant was "drinking beer" and smoking marijuana. Nealy asked defendant to rob Hammond, and he refused. Defendant admitted he borrowed a gun from Nealy, but had no intention of using it to rob Hammond.

Defendant and Barkley proceeded to Hammond's house allegedly to buy more marijuana. Blue allowed defendant to enter the house, and defendant greeted Fairley. Fairley told defendant that Hammond was in the middle bedroom. Barkley remained at the back door with Blue. Defendant approached Hammond and offered to buy some marijuana. As defendant reached for his money, the .380 caliber handgun fell out of his pocket. Defendant and Hammond struggled to gain control of the gun. As the two struggled, the gun discharged and shot a third party in the leg. Hammond yelled for Blue. Defendant and Hammond continued to struggle and moved into the hallway. Defendant observed Blue and Barkley "tussling by the door." Defendant testified the gun discharged two more times. Defendant gained control of the gun and ran out of the house. Barkley followed him.

Perkins picked defendant and Barkley up. Nealy was also present in the vehicle. Defendant admitted he told Nealy he had shot someone in the leg and that the gun was "hot." Defendant gave Nealy the .380 caliber handgun. Perkins dropped defendant off at his uncle's house. Defendant was concerned police would search for him at his home. Defendant admitted using marijuana and selling crack cocaine. He also admitted he had been drinking alcohol and smoking marijuana all day when Blue was killed.

Defendant was found guilty of felony murder and conspiracy to commit armed robbery. Defendant was sentenced to life imprisonment without parole. Defendant appeals.

II. Issues

Defendant argues: (1) he received ineffective assistance of counsel; (2) the imposition of life without parole when the jury did not find an intent to kill constitutes cruel and unusual punishment; and (3) the mandatory imposition of a sentence of life without parole when no intentional killing occurred is an impermissible intrusion by the legislative branch upon the authority of the judicial branch to determine the appropriate sentence for the crime and the offender.

III. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel when his trial counsel told the jury the State presented sufficient evidence of the attempted armed robbery. We disagree.

A. Standard of Review

*3 In *Strickland v. Washington,* the United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984). The test requires:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

Our Supreme Court has stated, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache,* 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). In *State v. Lowery,* our Supreme Court stated, "[w]e ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions." 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Analysis

During closing argument, defense counsel stated, "Fairley belatedly comes up with might have heard

something, don't know who said it. We certainly give that enough weight to be convinced beyond a reasonable doubt that there was an attempt at a robbery." Defendant asserts that "[w]ith one sentence, trial counsel admitted the State proved the attempted robbery, the only basis for the felony murder."

Defendant cites *State v. Harbison*, 315 N.C. 175, 180, 337 S.E .2d 504, 507 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986), and argues:

[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent.

An "admission of the defendant's guilt during the closing arguments to the jury is a per se prejudicial error." *Id.* at 177, 337 S.E.2d at 505.

Defense counsel questioned Fairley's credibility and believability throughout his closing argument. He argued the following to the jury: (1) Fairley testified under oath she did not know Hammond kept illegal drugs in his house, yet she pled guilty to maintaining a dwelling house for keeping controlled substances; (2) "[Fairley] contradicts Rodrick Hammond about the shots that were fired;" (3) "[Fairley] said, 'I might have heard something about 'give it up, man.' That's what she said on the stand. And she wasn't sure, might have heard something like that;" (4) when Fairley recounted the details of what happened to the assistant district attorney, the day after the

shootings, she failed to mention she heard the words, "give it up;" and (5) "Credibility? Believability? Are we anywhere yet?"

*4 After reviewing the entirety of trial counsel's closing argument, it is evident he was attempting to convince the jury Fairley was not a credible witness. Trial counsel argued:

First you must find beyond a reasonable doubt that the defendant attempted to commit armed robbery in that room and that, while attempting to commit armed robbery, he killed David Blue. More simple. That's more simple.

What's the problem with that? Nothing that Roderick Hammond says established that there was any attempt to commit a robbery. The only thing that he says is he saw a gun and we started struggling over it. Nothing was said about give me your drugs, give me your money.

[Fairley] belatedly comes up with might have heard something, don't know who said it. We certainly give that enough weight to be convinced beyond a reasonable doubt that there was an attempt at a robbery.

(Emphasis supplied).

Given the entirety of the closing argument, it is apparent that this final sentence was a rhetorical device not intended to concede guilt, but rather to support a not guilty verdict.

Defendant also contends his trial counsel provided him ineffective assistance when he argued to the jury:

> You need evidence which persuades you beyond a reasonable doubt. *Nobody-nobody in this courtroom knows what shot killed David Blue.* Nobody in this courtroom knows what was going on when the shot was fired that killed David Blue. Nobody knows that. We can't speculate, we can't guess, we can't theorize. It's a bad thing he died, so let's just make a guess and send him off for the rest of his life for that. You can't do that.

(Emphasis supplied).

Defendant asserts "[t]his was especially a problem since his client had taken the stand and told the jury what was going on when the shot was fired; he was struggling over a gun with Hammond." Defendant also argues, "it appears as though [defendant] is not to be believed by his own attorney."

Trial counsel argued the State's failure to meet its burden to prove how Blue was killed and urged the jury not to speculate how Blue was killed. Trial counsel was not questioning defendant's credibility; rather, he was arguing, consistent with his defense theory, the jury should find defendant not guilty. Trial counsel zealously advocated for defendant and used trial tactics that we will not second-guess. *Lowery*, 318 N.C. at 68, 347 S.E.2d at 739.

Defendant fails to prove trial counsel's assistance was deficient. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693. Trial counsel did not admit "defendant's guilt during closing arguments to the jury." *Harbison*, 315

N.C. at 177, 337 S.E.2d at 505. Trial counsel urged the jury to find Fairley's testimony incredible and argued the State failed to meet its burden to prove who shot Blue. Viewed in the context of the entire closing argument, trial counsel's statements provided defendant with assistance "within the boundaries of acceptable professional conduct." *Roache*, 358 N.C. at 280, 595 S.E.2d at 406. This assignment of error is overruled.

IV. Cruel and Unusual Punishment

***5** Defendant argues the jury did not find an intent to kill, and without such a finding, the imposition of life without parole constitutes cruel and unusual punishment. We disagree.

A. Standard of Review

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a narrow proportionality principle that applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11, 20, 155 L.Ed.2d 108, 117 (2003) (internal quotations and citations omitted).

We noted that this Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. *But outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.* Although we stated that the proportionality principle would ... come into play in the extreme example ... if a legislature made overtime

parking a felony punishable by life imprisonment, we held that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 21, 155 L.Ed.2d at 117 (internal quotations and citations omitted) (emphasis supplied).

B. Analysis

Defendant cites no authority in support of this contention. Defendant concedes "this Court and our State Supreme Court, [have] held that the felony murder rule was promulgated to deter even accidental killings from occurring during the commission of a dangerous felony." *See State v. Richardson*, 341 N.C. 658, 670, 462 S.E.2d 492, 500 (1995) ("Felony murder, by its definition, does not require intent to kill as an element that must be satisfied for a conviction."). The jury was not required to find that defendant intended to kill Blue.

N.C. Gen.Stat. § 14-17 (2005) provides:

A murder which shall be perpetrated by means of ... or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon* shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole.

(Emphasis supplied).

"North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense." *State v. Stinnett*, 129 N.C.App. 192, 200, 497 S.E.2d 696, 701, *disc. rev. denied*, 348 N.C. 508, 510 S .E.2d 669, *cert. denied*, 525 U.S. 1008, 142 L.Ed.2d 436 (1998). A punishment of life imprisonment without parole is consistent with N.C. Gen.Stat. § 14-17 and does not violate the Eighth Amendment. This assignment of error has no merit and is dismissed.

V. Legislative Branch

Defendant argues the mandatory imposition of a sentence of life without parole without proof of an intentional killing is an impermissible intrusion by the legislative branch upon the authority of the judicial branch to determine the appropriate sentence for the crime and the offender. Defendant cites no authority whatsoever to support this argument.

***6** Defendant concedes "decisions of our appellate courts are contrary to this assertion. It has been held that the General Assembly alone prescribes the maximum and minimum punishments which can be imposed on those found guilty of crimes." *See State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986) ("It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the punishment for those crimes."). This assignment of error is also utterly without merit and is dismissed.

VI. Conclusion

Defendant was not deprived of his right to effective assistance of counsel. Defense counsel zealously advocated for defendant and argued the State's witnesses and lack of proof on the killer of Blue to the jury.

Defendant's sentence of life imprisonment without parole does not constitute cruel and unusual punishment and is not an impermissible intrusion by the legislative branch upon the authority of the judicial branch. *Id.* Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We find no error in the judgment and sentence imposed.

No Error.

Judges GEER and JACKSON concur.
Report per Rule 30(e).

N.C.App.,2006.
State v. Verbal
628 S.E.2d 260, 2006 WL 997758 (N.C.App.)

END OF DOCUMENT

APPENDIX B

State v. VerbalN.C.,2006.Only the Westlaw citation is currently available.

Supreme Court of North Carolina.
STATE of North Carolina
v.
Robert Alexander VERBAL.
No. 280A06.

Oct. 5, 2006.

Nora Henry Hargrove, for Robert A. Verbal.

Danielle Marquis, Special Deputy Attorney General, Garland N. Yates, District Attorney, for State of NC.

ORDER

*1 Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant on the 23rd day of May 2006 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Attorney General, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 5th day of October 2006."

N.C.,2006.
State v. Verbal
--- S.E.2d ----, 2006 WL 2939123 (N.C.)

APPENDIX C

STATE OF NORTH CAROLINA
MOORE COUNTY CARTHAGE
03CRS050551 51

IN The General Court of Justice
Superior Court Division

STATE VS
VERBAL, ROBERT, ALEXANDERA

Race: B
Sex: M
DOB 11/4/1980

Attorney for State
MCSWEENEY, WARREN

Attorney for Defendant
ROOSE, RICHARD (appointed)

Judgment and Commitment
Active Punishment Felony
(Structured Sentencing)

The defendant was found guilty by a jury of:

File No.(s)	Off.
03CRS050551	51
03CRS050674	51

Offense Description
FIRST DEGREE MURDER
CONSP ROBBERY DANGS WEAPON

Offense Date
2/6/2003
2/6/2003

G.S. NO.	F/M	CL.
14-17	F	A
14-87	F	E

The Court:
Makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court:
Makes no written findings because the prison term imposed is for a Class A felony.

The Court, having considered evidence, arguments of counsel and statements of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

Class A Felony: Life Imprisonment without parole

In the custody of N.C. Doc

The defendant has been given credit for 552 days spent in confinement prior to the date of this Judgment as a result of this Charge(s)
County 66

SIGNATURE OF JUDGE

Date	Name of Judge
8/12/2004	HON. RONALD E. SPIVEY

Signature Of Presiding Judge
/S/

Date
8/12/2004
Date Certified Copies Delivered to Sheriff
8/12/2004 Assistant CSC

APPENDIX D

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DEVISION
03 CRS 50551
MOTION FOR APPROPRATE RELIEF

STATE OF NORTH CAROLINA
COUNTY OF MOORE
STATE OF NORTH CAROLINA,
v.
ROBERT VERBAL,
Defendant.

NOW COMES the Defendant pursuant to N.C. Gen. Stat. 15A-1411 *et seq,* the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sec. 3 of the North Carolina Constitution and moves that an Order be entered vacating the conviction of first degree murder in 03 CRS 505S1. In support of this motion the Defendant shows as follows:

PROCEDURAL BACKGROUND

1. The Defendant was indicted by the grand jury of Moore County on the charges of first degree murder, assault with a deadly weapon and conspiracy to commit armed robbery.

2. The Defendant pleaded not guilty and was tried before a jury and the Honorable Ronald W. Spivey at the August 9, 2004 criminal session of Moore County Superior Court.

3. After deliberating extensively the jury returned to the courtroom with the following question:

> "Under the North Carolina Law for first degree felony murder, could the killing have accured (sic) by accident and still fall under this law?" (Ex. A)

4. The Court instructed the jury that, "The felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of dangerous felony."

5. After receiving the above instruction, the jury immediately returned a verdict of guilty of first degree murder under the felony murder rule. (Ex. B)

6. On August 13, 2004 the undersigned received phone calls from two of the jurors who have deliberated on the case. Both expressed their outrage at the unjust severity of the sentence imposed. Both expressed their belief that the killing was accidental. Attached are affidavits of 2 jurors who sat on the case.

7. The Jury returned a verdict of not guilty to premeditated murder, but guilty to felony murder, not guilty to assault with deadly weapon with intent to kill inflicting serious injury, and guilty to conspiracy to commit armed robbery.

8. Upon the verdict of guilty of felony

murder, a sentence was imposed of life in prison without parole.

CLAIM ONE
(Cruel and unusual punishment)

THE IMPOSITION OF LIFE WITHOUT PAROLE WHEN THE JURY DID NOT FIND THAT THE DEFENDANT INTENDED TO KILL THE VICTIM CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

9. The Eighth Amendment contains a proportionality component in the non-capital context Ewing v. California, 538 U.S. 11 123 S.Ct. 1179 (2003)

10. Sentences which are grossly disproportionate to the offense committed violate the Eighth Amendment to the United States Constitution.

11. The Defendant contends that the shooting of David Cornelius Blue was accidental.

12. Since the jury did not find the Defendant guilty of premeditated murder, and asked a question dealing directly with whether the law requires a verdict of guilty to felony murder even if the killing was accidental, the Defendant contends that a substantial number of jurors believed that the killing of David Blue was

accidental, and that the affidavits of the jurors establish that the State failed to prove that the shooting was anything other than an accidental shooting.

13. A sentence of life without parole means that the defendant will spend the rest of his life in prison. Such a sentence is the second most severe sentence under the law after the death penalty. It is also the same sentence a person receives who commits premeditated murder without a capital aggravating factor. It is more severe than the sentence imposed for second-degree murder, which is the intentional killing of the victim with malice.

14. The Defendant contends that the sentence of life without parole imposed on the defendant under the facts of this case is grossly disproportionate to the offense, in violation of the Defendant's rights secured by the Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM TWO
(separation of powers).

THE MANDATORY IMPOSITION OF A SENTENCE OF LIFE WITHOUT PAROLE WHEN THE JURY DOES NOT FIND A DEFENDANT GUILTY OF AN INTENTIONAL KILLING IS AN IMPERMISSIBLE INTRUSION BY THE LEGISLATIVE BRANCH UPON THE AUTHORITY OF THE JUDICIAL BRANCH TO FASHION APPROPRIATE CRIMINAL SENTENCES.

15. Under Art. I, sec. 3 of the North

Carolina Constitution the legislative, executive, and judicial branch are distinct and separate.

16. It is within the province of the legislative branch to define crimes and establish the parameters of punishment within which members of the judicial branch will select an appropriate punishment.

17. N.C. Gen. Stat. 15A-1340.I2 expresses the public policy of this State that judges should impose criminal sentences, taking into account "factors that may diminish or increase the offender's culpability"

18. The sentence imposed in 03 CRS 50551 was a mandatory sentence of life without parole which was dictated by the legislature without the opportunity of the Court to exercise the discretion bestowed on him by Article I, sec. 3 of the North Carolina Constitution.

19. The Defendant acknowledges that there is a very narrow range of offenses within which the legislature may dictate a criminal sentence without infringing on the constitutional authority of the judiciary to select a sentence - such as premeditated and deliberated murder when the jury does not recommend the death penalty.

20. The Defendant does not quarrel with the power of a judge to impose a sentence of a term of years which may exceed the life expectancy of a defendant in a particular case. However, the Defendant contends that the imposition of a sentence of life without parole, made mandatory by the legislature without the input of a judge or the jury, violates the separation of powers clause of the North Carolina Constitution.

CLAIM THREE
(Due Process Violation)

THE IMPOSITION OF A SENTENCE OF LIFE WITHOUT PAROLE WITHOUT A FINDING OF CRIMINAL MENS REA VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS SECURED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

21. The Defendant contends that under due process *mens rea* is a fundamental component of criminal offenses.

22. Except in a very narrow class of crimes, where strict liability in the criminal context is allowed, (e.g. speeding) the Defendant contends it violates due process to impose criminal punishment on a person who does not possess criminal *mens rea*.

23. In the present case, the jury did not convict the defendant of premeditated homicide, (first degree), intentional homicide

(second degree), homicide with passion (voluntary manslaughter), or reckless homicide {involuntary manslaughter),

24. Rather, the Defendant submits that some or all of the jurors believed the killing was accidental and that the Sate failed to prove that the shooting was anything other than accidental Accident is a complete defense to a criminal charge.

25. If the jury had determined that the Defendant had killed David Blue with a reckless disregard to his safety, the maximum sentence he could have received even with the highest prior record level would have been S9 months.

26. Without any finding of criminal *mens rea* the Defendant has received a sentence of life without parole for the death of David Blue.

27. The Defendant contends that the imposition of a sentence of life without parole, without any finding related to *mens rea*, or without resolving the Enmund/Tison issues against the Defend nt, violates the Defendant's right to due process secured by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, the Defendant requests that an Order be entered vacating the conviction and sentence in 03 CRS 50551, and placing the matter on the calendar for sentencing on conspiracy to commit armed, robbery

This the 23 day of August, 2004

/S/

Richard G. Roose
Attorney for Defendant
115 S. Fayetteville Street, Suite 400
Asheboro, NC 27203
Phone: (336) 626-8000
Fax: (336) 626-8007

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached document on ail parties to this cause by:

__X__ Hand delivered a copy hereof to the attorney for each said party addressed as follows:

___ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

___ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

___ Telecopying a copy hereof to the attorney for each said party as follows:

Warren McSweeney
Assistant District Attorney
102 Monroe Street
Carthage, NC 28327

This the 23 day of August, 2004

By: _____

Richard G. Roose
Moser Schmidly & Roose
Attorneys and Counselors at Law
115 S. Fayetteville Street, Suite 400
Asheboro, NC 27203
Phone: (336) 626-8000
Fax: (336) 626-8007

EXHIBIT A

SIR,

UNDER THE NORTH CAROLINA STATE LAW FOR FIRST DEGREE FELONY MURDER, COULD THE KILLING HAVE ACCURED BY ACCIDENT AND STILL FALL UNDER THIS LAW?

COURT 5

STATE Of NORTH CAROLINA
COUNTY OF MOORE

IN THE GENERAL COURT OF CJUSTICE
SUPERIOR COURT DIVISION
FILE NO: 03 CRS 50551

STATE OF NORTH CAROLINA
-VS-
ROBERT ALEXANDER VERBAL
DEFENDANT

VERDICT

WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT:

1 GUILTY OF FIRST DEGREE MURDER
ANSWER: YES

IF YOU ANSWER "YES", IS IT:

A. ON THE BASIS OF MAILCE, PREMEDITATION AND DELIBERATION?
ANWSER:_____

B. UNDER THE FIRST DEGREE FELONY MURDER RULE?
ANSWER: YES

OR

2. GUILTY OF SECOND DEGREE MUHDER;
ANSWER__

OR;

3. GUILTY OF INVOLUNTARY MANSLAUGHTER;
ANSWER__

OR;

4. NOT GUILTY
ANSWER__

THIS THE 12TH DAY OF AUGUST, 2004.

DAVID K. TRAIL
SIGNATURE OF FOREPERSON

DAVID K. TRAIL
PRINTED NAME OF FOREPERSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CR 50551-2

NORTH CAROLINA
MOORE COUNTY

STATE OF NORTH CAROLINA

v.

ROBERT ALEXLEXANDER VERBAL,
Defendant.

AFFIDAVIT

Affiant, being first duly sworn, says:

1. My name is Mark Adams and I reside in Moore county North Carolina.

2. From August 9, through August 12, 2004, I served on the jury in the above-referenced matter, in which the defendant was charged with first degree murder.

3. After extensive deliberations and careful consideration of the evidence presented I concluded that the State had failed to prove that defendant had acted intentionally when the shots that killed deceased were fired.

4. It is my belief that many if not most of my fellow jurors believed as I did that the shooting was accidental.

5. After being instructed that an accidental shooting was sufficient to require the application of the felony murder rule I believed I had no choice but to vote to find the defendant guilty.

6. I believe that the sentence imposed is grossly unfair given that the evidence showed that the Defendant's conduct was unintentional in this case.

/s/
Mark Adams

Sworn to and subscribed before me this 20th day of August, 2004

/s/
Notary Public
My commission expires: 4-19-2008

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CR 50551-2

NORTH CAROLINA
MOORE COUNTY

STATE OF NORTH CAROLINA

v.

ROBERT ALEXLEXANDER VERBAL,
Defendant.

AFFIDAVIT

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6. I believe that the sentence imposed is grossly unfair given that the evidence showed that the Defendant's conduct was unintentional in this case.

/s/
Sawn Chapel Camina

Sworn to and subscribed before me this 20th day of August, 2004

/s/
Notary Public
My commission expires: Oct 7, 2007